Cahaya Utama Industri Sdn Bhd v Kong Kam Peng

HIGH COURT (SHAH ALAM) — ORIGINATING MOTION NO 25-7-1995
JAMES FOONG J
14 SEPTEMBER 1995

Land Law *— Restraints on dealings — Caveat — Removal — Whether caveator had caveatable interest — Whether increase of size of land by fraud and misrepresentation gave rise to caveatable interest — Whether any serious question to be tried*

The plaintiffs were the registered owner of a piece of land. The defendant was the plaintiffs' neighbour. The defendant alleged that the plaintiffs had encroached into his land by fraud and misrepresentation as a result of which the defendant's land was reduced in size. The defendant therefore placed a private caveat on the plaintiffs' land. The plaintiffs now applied to remove it.

Under s 323 of the National Land Code 1965, a private caveat may only be entered by a person 'claiming title to, or having registerable interest in, any alienated land or any right to such title or interest'. The plaintiffs therefore submitted that since the defendant was only disputing the area involved and not the title or registerable interest over the said land, the caveat so lodged by the defendant was unsustainable.

The defendants challenged this removal on the basis that there was a serious question to be tried in respect of their counter-claim against the plaintiffs in an existing civil High Court action which questioned the indefeasibility of the plaintiffs' title or interest in plaintiff's land due to fraud or misrepresentation and on the balance of convenience, the caveat should remain status quo.

Held, dismissing the application:

(1) The present case, unlike other usual applications for the removal of caveats, involved the physical aspect of the land, ie the actual size, rather than the ownership, rights, title or interest registerable in the document of title. The parameters of caveatability was circumscribed by the word 'title' and 'registerable interest' and registerable interest pertains to ownership of land or entitlement to leases, charges or easement.

(2) The defendant's assertion that the plaintiffs were not legal owners to the same portion of the land in question by virtue of their fraud and misrepresentation and that the defendant may be entitled to a share in their land involved question of title and interest over plaintiffs' land and the defendant would therefore possess a caveatable interest to lodge a private caveat.

(3) The substantial variations of the size of the plaintiffs' land at different stages raised a serious question to be tried, particularly when there was a claim by the defendant that his land had been encroached by fraud and misrepresentation.

(4) On a balance of convenience, it was better to maintain the status quo of the parties until final disposal of the civil High Court action. In the event of the plaintiffs' land being disposed of to a third party by the plaintiffs, there would be greater injustice and would further complicate the matter.

[Bahasa Malaysia summary

Plaintif adalah tuanpunya berdaftar sebidang tanah. Defendan adalah jiran plaintif. Defendan mendakwa bahawa plaintif telah memakan masuk ke dalam tanahnya melalui fraud dan salah nyata dan kesudahannya tanah defendan telah dikurangkan saiznya. Oleh itu defendan telah memasukkan satu kaveat persendirian ke atas tanah plaintif. Plaintif sekarang memohon untuk mengetepikan kaveat itu.

Di bawah s 323 Kanun Tanah Negara 1965, satu kaveat persendirian boleh dimasukkan hanya oleh seorang yang 'menuntut hakmilik kepada, atau mempunyai kepentingan yang boleh didaftar dalam, apa-apa tanah berimilik atau apa-apa hak kepada hakmilik atau kepentingan sedemikian'. Plaintif oleh itu berhujah bahawa memandangkan yang defendan cuma mempertikaikan luas tanah yang terbabit dan bukan hakmilik atau kepentingan yang boleh didaftar ke atas tanah itu, kaveat yang dimasukkan oleh defendan tidak boleh disokong.

Defendan mencabar pengetepian ini atas alasan bahawa terdapat soalan serius untuk dibicarakan berkenaan tuntutan balas mereka terhadap plaintif dalam satu tindakan sivil di Mahkamah Tinggi yang menyoal ketakbolehsangkalan hakmilik plaintif atau kepentingan dalam tanah plaintif akibat fraud atau salah nyata, dan atas imbangan kesenangan, kaveat itu harus kekal status quo.

Diputuskan, menolak permohonan itu:

(1) Kes ini, tidak sama dengan lain-lain permohonan biasa untuk pengetepian kaveat, membabitkan aspek fizikal tanah itu, iaitu saiz sebenar, dan bukannya kepunyaan, hak, hakmilik atau kepentingan yang boleh didaftar dalam surat hakmilik itu. Parameter kebolehan mengkaveat adalah dibatasi oleh perkataan 'hakmilik' dan 'kepentingan yang boleh didaftar' dan kepentingan yang boleh didaftar merujuk kepada kepunyaan tanah atau hak kepada penyewaan, cagaran atau easmen.

(2) Dakwaan defendan bahawa plaintif bukannya tuanpunya di sisi undang-undang bahagian sama tanah yang terbabit menerusi fraud dan salah nyata mereka dan bahawa defendan mungkin berhak kepada satu bahagian dalam tanah mereka

melibatkan soalan tentang hakmilik dan kepentingan ke atas tanah plaintif dan defendan lantaran itu mempunyai satu kepentingan yang boleh dikaveat untuk memasukkan satu kaveat persendirian.

(3) Perubahan besar dalam saiz tanah plaintif pada peringkat-peringkat berlainan menimbulkan soalan yang serius untuk dibicarakan, terutama sekali apabila terdapat satu tuntutan oleh defendan bahawa tanahnya telah dicerobohi melalui fraud dan salah nyata.

(4) Atas imbangan kesenangan, adalah lebih baik untuk mengekalkan status quo pihak-pihak itu sehingga penyelesaian akhir tindakan sivil di Mahkamah Tinggi. Jika tanah plaintif dijual kepada satu pihak ketiga oleh plaintif, ketidakadilan yang lebih besar akan berlaku dan ia akan merumitkan lagi perkara itu.]

Notes

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419; [1995] *Mallal's Digest* paras 1164–1186.

Cases referred to

Eng Mee Yong & Ors v Letchumanan [1979] 2 MLJ 213 (folld)
Hamilton, Re, ex p Iredale [1902] SR(NSW) 117 (folld)
Solling, Ex p (Chisolm, Caveator) [1893] NSWLR 399 (folld)

Legislation referred to

National Land Code 1965 ss 83(2), 323, 340

CK Lim (*Baharuddin & CK Lim*) for the plaintiffs.
Ng Chek (*Ng Chek & Co*) for the defendant.

James Foong J: The plaintiffs are the registered owner of a piece of property held under HS(M) 9023 for PT 27049, Subang New Village, Mukim of Sungai Buluh, Daerah Petaling, State of Selangor (hereinafter be referred to as the plaintiffs' lot). The defendant is the plaintiffs' neighbour being registered owner of land held under HS(M) 4489 for Lot No PT 587, Mukim of Sungei Buluh, Daerah Petaling, State of Selangor (hereinafter be referred to as the defendant's lot).

On plaintiffs' lot, the defendant has placed a private caveat of which the plaintiffs now apply to remove. The defendant challenges this removal on the basis that there is a serious question to be tried in respect of their counter-claim against the plaintiffs in an existing civil action filed in this High Court bearing registration number 22-160-93, and on the balance of convenience, the caveat should remain to maintain status quo. The allegation of the defendant's counter-claim is that the plaintiffs have encroached into his land. According to the defendant, the original title to the plaintiffs' lot was QT(M) 28 for Lot 586

(hereinafter referred to as Lot 586) consisted of only two acres, and two acres would be equivalent to 8,092 sq m. Subsequently, when final title to Lot 586 was issued, the land area to this final title — PT 97 for Lot 19578 (hereinafter referred to as Lot 19578) was increased to 12,600 sq m. Lot 19578 was then partitioned into two, creating the plaintiffs' lot and another title bearing Lot 27048. The combined area of the plaintiffs' lot and that of Lot 27048 now reveals approximately 10,413 sq m.

From the above, one can observe the vast differences in land area from the original title of the plaintiff's lot to that of the present. This discrepancy, the defendant claims, is due to fraud and misrepresentation perpetuated by the plaintiffs in inducing the survey department to approve greater land area than what the plaintiffs are legally entitled to, and this increase has directly affected the defendant by a reduction in the size of his lot.

The plaintiffs did not file any affidavit in reply besides the initial affidavit of support to their application for the removal of the caveat. During trial, the plaintiffs' counsel stressed mainly on the fact that the defendant has no caveatable interest over the plaintiffs' lot. They submitted that s 323 of the National Land Code (NLC) clearly states that a private caveat may only be entered by a person, 'claiming title to, or registerable interest in, any alienated land or any right to such title or interest'. Since the defendant is only disputing the area involved and not the title or registerable interest over the said land, the caveat so lodged by the defendant is unsustainable.

The defendant on the other hand argued that their counterclaim in Civil Suit No 22-160-93 questioned the indefeasibility of the plaintiffs' title or interest in plaintiffs' lot due to fraud or misrepresentation. This is substantiated by the enormous differences in area commencing from the original Lot 586 to present situation. This vast differences in area also contravenes s 83(2) of the NLC which should be read with cl 70(a) of the Survey Regulations. This regulation only provides a permissible variation of up to 5% in area from a previous surveyed title where the land is under 100 acres.

A simple calculation will reveal each area stated in title commencing from Lot 586 right up to the plaintiffs' lot having exceeded this permissible level of variation.

This case, unlike other usual applications for the removal of caveats involves the physical aspect of the land, in terms of its actual size rather than the ownership, rights, title or interest registerable in the document of title. Section 323(1)(a) of the NLC, as rightly submitted by learned counsel for the plaintiffs explicitly applies only to a person claiming title to, or any registerable interest in the said land. As reiterated in *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 at p 755, the parameters of caveatability is circumscribed by the word 'title' and 'registerable interest', and 'registerable interest pertains to ownership of land or entitlement to leases, charges or easement.' Within

these confines, do the circumstances of this case bring the defendant within the category of a person having a caveatable interest?

In order to answer this question, one must determine the actual substance of the defendant's claim. In the opinion of this court, his claim of encroachment by the plaintiffs at his expense, amounts to a claim that the plaintiffs' title and interest in the plaintiffs' lot is questionable. In short, he is asserting that the plaintiffs are not even the legal owners to the plaintiffs' lot for reason that the area listed in the document of title to the plaintiffs' lot has been inserted erroneously by fraud and misrepresentation. With this, the defendant is asserting that he may be entitled a share in the plaintiffs' lot. By this it can only mean a claim to a share in the title and interest of the plaintiffs' lot. This is justifiable, especially when a substantial area of alleged infringement is involved, as in this case. Though the plaintiffs may be the registered proprietors, but their title and interest in this land is not indefeasible by virtue of s 340 of the NLC, where fraud and/or misrepresentation is involved. Since there is a claim involving title and interest over a land, the defendant would possess a caveatable interest to lodge a private caveat over the plaintiffs' lot.

This view seems to have been shared by our Australian counterpart where a similar Torren System of land registration is being practised. In *Ex p Solling (Chisholm, Caveator)* [1893] NSWLR 399, the appellate court of New South Wales allowed the caveat to remain under circumstances where the original document of title did not include a strip of land which appeared in a subsequent issue document of title, and this strip of land was the land in respect of which the caveat was lodged. Again in the case of *Re Hamilton, ex p Iredale* (1902) SR(NSW) 117, the Chief Justice of New South Wales allowed a caveat to remain on a certificate (title) which was claimed to include land in dispute by reason that the caveators or their predecessors in title had always been in possession of the land.

As the issue of caveatable interest is settled, this court shall now proceed to examine whether the defendant, as caveator can satisfy this court that on the evidence presented, his claim to a title or interest in the property does raise a serious question to be tried in accordance with the principles as laid down in the case of *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 213.

In the defendant's counter-claims he is seeking inter-alia for a declaration that the boundary of his property and that of the plaintiffs be determined, and thereafter the document of title to the plaintiffs' lot be returned to the Land Administrator for rectification. Obviously, in order to determine whether there is any substance to the defendant's allegation one must discover the exact land area in the original title to Lot 586, for this is foundation of the defendant's claim to the substantial differences in each of the subsequent titles. The defendant has alleged that it was approximately two acres (or about 8,092 sq m), and if this is correct than the subsequent title which is Lot 19578 stated as having

12,600 sq m would be substantially greater than the original 8,092 sq m. Greater confusion is now added with the two sub-divided titles of the plaintiffs' lot and Lot 27048 which was born out of Lot 19578 having a combined area of 10,413 sq m. Though this is a reduction, but the substantial variations at different stages certainly raise a serious question to be tried particularly when there is a claim by the defendant that his lot has been encroached by fraud and misrepresentation.

Having decided on the above, this court is of the view that on a balance of convenience it is better to maintain the status quo of the parties until final disposal of Civil Suit 22–160–93. In the event of the plaintiffs' lot is disposed of to a third party by the plaintiffs, there would be greater injustice and would further complicate this delicate matter.

For reasons stated above, this court hereby dismiss the plaintiffs' application and orders that the caveat so placed by the defendant on the plaintiffs' Lot 27049 to remain until final disposal of Civil Suit 22–160–93 or until further order.

Application dismissed.

Reported by Victor T Gidwani